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# Would use of the prerogative to denounce the ECHR ‘frustrate’ the Human Rights Act? Lessons from *Miller*

Gavin Phillipson\*

Alison L Young\*

## Introduction

It is now many years since the Conservatives first started talking about withdrawing the UK from the European Convention on Human Rights (ECHR) and replacing the Human Rights Act 1998 (HRA) with a British Bill of Rights.<sup>1</sup> The Prime Minister, Theresa May, reiterated the desire to do both within the last year.<sup>2</sup> While these plans may have been kicked into the very long grass of Brexit,<sup>3</sup> recent events have shown the folly of making confident predictions about future political developments. Under at least one possible scenario, a new Conservative Prime Minister might offer ECHR withdrawal as ‘red meat’ to appease a Tory Right aggrieved by a softer Brexit and/or a longer transitional period for EU withdrawal than previously

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\* Professor of Law, Durham University.

\* Professor of Public Law, Hertford College, University of Oxford. Our grateful thanks are due to Robert Craig, Tom Hickman, Roger Masterman, Alex Williams and Jack Williams for very helpful comments on an earlier draft, and to the editor and anonymous reviewer. The usual disclaimer applies. All websites were last visited on 26 June 2017.

<sup>1</sup> The 2015 Manifesto, available at

<https://www.bond.org.uk/data/files/Blog/ConservativeManifesto2015.pdf> promised to ‘break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK’. The Conservative’s 2010 manifesto also pledged to replace the HRA with a British Bill of Rights (at p. 79): see <http://www.general-election-2010.co.uk/2010-general-election-manifestos/Conservative-Party-Manifesto-2010.pdf>

<sup>2</sup> ‘UK must leave the European Convention on Human Rights, says Theresa May’, *The Guardian*, 25 April 2016. ‘May: I’ll rip up human rights laws that impede new terror legislation’ *The Guardian*, 6 June 2017. Despite this, the 2017 Manifesto (at p. 37) ruled out withdrawal from the ECHR for the lifetime of the Parliament and promised only a review of the HRA once Brexit was complete: see <https://s3.eu-west-2.amazonaws.com/manifesto2017/Manifesto2017.pdf>

<sup>3</sup> Neither plan was mentioned in the Queen’s Speech of June 2017 (available at <https://www.gov.uk/government/speeches/queens-speech-2017>), which set the legislative agenda for the next two years, and was dominated by seven Brexit-related Bills.

promised. It is important to note, however, that plans to replace the Human Rights Act with a British Bill of Rights have made very little progress over recent years. While we have had a Bill of Rights Commission<sup>4</sup>, a Conservative Party discussion paper<sup>5</sup>, and various statements by ministers,<sup>6</sup> what we have *not* had is either a draft of the promised Bill or even the greenest of Green Papers. This indicates the formidable difficulties of coming up with a replacement for the HRA, including the using up of substantial amounts of legislative time made particularly precious by the ongoing demands of Brexit,<sup>7</sup> the prospect of serious and sustained opposition in the House of Lords, and major difficulties deriving from the devolution settlements.<sup>8</sup>

In light of these difficulties,<sup>9</sup> this article considers the possibility that a future Conservative Government could decide to withdraw from the ECHR as a first step: something that might appear an attractive first move, because it is both relatively simple to achieve<sup>10</sup>

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<sup>4</sup> Commission on a Bill of Rights, *A UK Bill of Rights: The Choice Before Us* (December 2012).

<sup>5</sup> The Conservative Party, *Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws* (October 2014), p.6.

<sup>6</sup> See e.g. HC Deb., Vol.618, col.355, 8 December 2016 (Jeremy Wright QC MP); HC Deb, 8 July 2015, col. 311 (David Cameron MP). See e.g. House of Commons Justice Committee, Oral Evidence, The Work of the Secretary of State HC620, 7 September 2016, Q78-Q91; House of Lords Select Committee on the EU (Justice) Oral Evidence, Session no 8, Inquiry on Repealing the Human Rights Act, 2 February, 2016, Q79-90.

<sup>7</sup> The Queen's Speech for 2017 contained seven Bills relating to Brexit.

<sup>8</sup> Each of the devolved bodies is disabled from legislating contrary to 'the Convention rights', as defined in the Human Rights Act (Scotland Act, s. 29, Northern Ireland Act, s. 6, Government of Wales Act 2006, s. 94). Hence, repeal of the HRA would trigger the Sewel Convention since it would modify the distribution of powers between Westminster and the devolved nations. Additionally, the Good Friday Agreement (Cm. 3833/1998) requires the incorporation of the ECHR into Northern Irish law.

<sup>9</sup> The failures of the Bill of Rights Commission to agree on any proposals for a UK-wide instrument and of the Northern Ireland Human Rights Commission to come forward with a Bill of Rights for Northern Ireland provide further evidence in this regard (Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us*, Vols 1 and 2, December 2012) and Northern Ireland Human Rights Commission, *Is that Right?: Fact and Fiction on a Bill of Rights*, January 2012, which notes the debates and public consultation on the adoption of a Bill of Rights for Northern Ireland, and the lack of progress on producing such an instrument.

<sup>10</sup> Though as noted above it would cause problems re the Good Friday Agreement; for discussion see A. O'Donoghue, & B. Warwick, 'Constitutionally Questioned: UK Debates, International Law, and Northern Ireland' (2015) 66(1) NILQ, 93-104; A. O'Donoghue, C. Murray and B. Warwick, 'The Implications of the Good Friday Agreement for UK Human-Rights Reform' (2017) *Irish Yearbook of Int Law* (forthcoming).

and would resolve at a stroke one of the chief objections of Eurosceptic Conservatives to the HRA – that (as they see it) it is tied umbilically to the ECHR and the interpretive authority of the European Court of Human Rights in Strasbourg.<sup>11</sup> Such a first step would likely be accompanied with a reiteration of the promise, as a longer-term second step, to replace the HRA with a British Bill of Rights. However, withdrawal from the ECHR would take effect only six months after notice was given.<sup>12</sup> Given the above history, it seems likely that the whole process of Green Paper, draft legislation, full consultation, White Paper and piloting a Bill through both Houses could take several years. Moreover the scale of the effort involved might well lead a Government – perhaps successive Conservative governments – to conclude that it was simply not worth the candle; that instead the HRA, shorn of the ECHR, could *become* the new British Bill of Rights: not perfect, but something that would *do*, given the effort required to come up with and implement an acceptable replacement. At the least, successive governments might continue to kick the ‘British Bill of Rights’ can down the road, with the result that a Human Rights Act, thought of as only a ‘caretaker’ Bill of Rights following ECHR withdrawal, might end up staying in place for decades. There are precedents for such supposedly ‘temporary’ constitutional reforms ending up as long-term features of the constitution. The separate reforms introduced to the House of Lords in 1911 and 1999 were expressly said to be only small steps towards comprehensive democratic reform of the House<sup>13</sup> – something we are still awaiting well into the 21<sup>st</sup> century. Moreover, the HRA itself

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<sup>11</sup> Under Article 46 ECHR the UK is bound to comply with judgments against it of the Strasbourg Court. Under section 2 HRA, courts must ‘take into account’ to all decisions of that Court and have tended to follow the Strasbourg jurisprudence: see further below at XXX-XXX.

<sup>12</sup> See Article 58(1) ECHR.

<sup>13</sup> The preamble to the 1911 Act declares the intention of replacing the House with ‘a Second Chamber constituted on a popular... basis’; the 1999 House of Lords Act, which removed most hereditary peers was intended only to be a first step towards comprehensive reform.

was intended to be only a first step towards an eventual British Bill of Rights.<sup>14</sup> Thus such a development would be all too typical of the often haphazard way the UK constitution evolves.

This possibility thus brings us to the principal concern of this article: whether, given the decision in *Miller v Secretary of State*,<sup>15</sup> the royal prerogative could be lawfully used to withdraw the UK from the ECHR if the HRA was still on the books. It addresses this issue through a close analysis of the effect of withdrawal on the provisions of the HRA. The orthodox principle, reinforced and applied by *Miller*, is that the foreign affairs prerogative may not be used to alter domestic law, frustrate the purpose of any statute, suspend its operation, or remove statutory rights. Hence if ECHR withdrawal *would* do any of these things, then the prerogative may not be used to do it.

Our analysis below suggests that whether the main provisions of the HRA would be frustrated by withdrawal depends most importantly on a key interpretive choice between what we term the *dependence* and the *bifurcation* arguments. Under the former, the protection of Convention rights under the HRA is dependent on the definition the Act gives of ‘the Convention’;<sup>16</sup> under this reading, ECHR withdrawal would cause the immediate loss of the Convention rights as enjoyed in domestic law by virtue of the HRA, thus rendering that Act a ‘dead letter’ and hence falling foul of the *Miller* principle. Under the *bifurcation* approach, in contrast, the definition of ‘the Convention rights’ protected by the HRA can remain distinct from the meaning of ‘the Convention’; this reading would preserve the operation and effect of the HRA’s key rights-protecting provisions even *following* withdrawal. However, our analysis also shows that even under this latter approach, there are some HRA

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<sup>14</sup> See J. Lewis, ‘The European Ceiling on Rights’ (2007) P.L. 273, at fn 21.

<sup>15</sup> *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5; [2017] 2 W.L.R. 583 (hereafter ‘*Miller*').

<sup>16</sup> See s. 21(1) HRA.

provisions – albeit rather peripheral ones – that would arguably become partially or fully frustrated.

This article also considers a second scenario: that a Government advised of the above might decide, either to *avoid* a *Miller*-like defeat in court, ruling against use of the prerogative to withdraw from the ECHR, or *following* such a defeat (as in *Miller* itself), to procure the passage of authorising legislation. This could be a simple two clause Bill, which, similarly to the European Union (Notification of Withdrawal) Act 2017, expressly authorised the Government to withdraw from the Convention, ‘notwithstanding the provisions of the Human Rights Act or any other enactment.’ If passed, such legislation would dispose of the legalities of the withdrawal question. But if, as we suggest above is likely, repeal and replacement of the HRA were put off for another day, a separate question would then arise: would the HRA still function to provide free-standing protection of human rights, shorn of the ECHR? A court could be forced to decide this question in the event that a claimant brought a case under the HRA after withdrawal, only to be faced by a public authority advancing the ‘dependence’ argument in order to show that its section 6 obligations to respect Convention rights<sup>17</sup> had now ceased to apply. Thus this article considers both the possibility of a challenge to the use of the prerogative to withdraw from the ECHR based on frustration of the HRA *and* the question of how the HRA would operate, post-withdrawal, were denunciation of the ECHR to have been expressly authorised by Parliament. Which (if any) of its provisions would continue to operate and which would become a dead letter?

In what follows we first provide a brief summary of *Miller*. We then argue that, while at first sight the HRA appears to function in a fundamentally free-standing way as regards the

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<sup>17</sup> Under s 6 HRA, public authorities, including courts, are bound to act compatibly with the ‘Convention rights’.

ECHR, a verdict on this depends crucially on the choice between the above-mentioned ‘dependence’ and ‘bifurcation’ arguments, which we analyse in detail. We go on to show how which reading succeeded would depend upon the interpretive approach taken by the courts to the HRA – an issue upon which *Miller* also sheds significant light. We will contend that a more purposive approach to construction – one that takes the HRA as a whole and, importantly, as an instrument of major constitutional significance – allows one to avoid the conclusion that it becomes a dead letter without the ECHR. However even this approach cannot avoid the conclusion that certain peripheral provisions are fully or partially frustrated. The final section therefore considers the interpretive dilemmas raised in seeking to apply *Miller* to a scenario that we conclude is far more nuanced and complex than previously realised.

### ***Miller*: a very brief summary.**

Other articles in this issue analyse the decision of the Supreme Court in *Miller* in great detail; in what follows we limit ourselves to the brief overview necessary for our purposes. In essence the Court held that the UK Government could not use the foreign affairs prerogative to commence the process of withdrawing the UK from the EU – a process assumed to result in the UK’s inevitable exit two years after Article 50 was triggered<sup>18</sup> - for the following reasons.

- (a) The result of the UK’s exit from the EU would be to profoundly change domestic law and remove domestic law rights – those EU law rights given domestic effect by Parliament in the European Communities Act 1972.<sup>19</sup>

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<sup>18</sup> Article 50(3) TFEU and *Miller*, at [34] and [36]-[37].

<sup>19</sup> *Miller*, at [83].

(b) Doing this would frustrate the basic purpose of the ECA, which was to give effect to and enable the UK's membership of the EU. As the Supreme Court said, 'ministers cannot frustrate the purpose of a statute or statutory provision...by emptying it of content or preventing its effectual operation.'<sup>20</sup>

(c) In particular – and this was a novel aspect of the decision – the Court found that membership of the EU and the effect given to it by Parliament via the ECA had given rise to a 'new source' of law in the UK, namely directly-effective EU law.<sup>21</sup> It was a new source, the Court said, in the sense that its origin is outside the UK, in the EU law-making institutions, and that UK law does not control its content: rather *all* directly applicable EU law flows directly through the 'conduit-pipe' of the ECA into UK law, without any further action by UK law or institutions.<sup>22</sup> Hence, the Court held, while the content of EU law was not fixed by the ECA, but rather varied 'from time to time', Ministers could not bring about the cutting off of the source of law itself,<sup>23</sup> something that would render the ECA wholly redundant.

(d) Thus *Miller* affirms the principle from the Bill of Rights 1688 and the *Case of Proclamations*<sup>24</sup> that the prerogative cannot be used to alter domestic law, frustrate the purpose of a statute, dispense with or suspend its effective operation or remove domestic law rights. While these principles are of long standing, they had not all been either affirmed or applied in modern times,<sup>25</sup> and certainly not by the UK's apex court.

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<sup>20</sup> *Miller*, at [51].

<sup>21</sup> *Miller*, at [65], [80].

<sup>22</sup> *Miller* at [61].

<sup>23</sup> *Miller* at [79]-[81].

<sup>24</sup> (1610) 12 Co. Rep. 74.

<sup>25</sup> Though note that Article 1 of the Bill of Rights 1688 was applied in New Zealand, in *Fitzgerald v Muldoon* [1976] 2 N.Z.L.R. 615.



(e) Controversy has been further stirred<sup>26</sup> by the Supreme Court's possible addition to the above principles the further proposition that the prerogative cannot be used to bring about 'a major change to UK constitutional arrangements'.<sup>27</sup> The removal of EU law as a source of domestic law would amount to just such a major constitutional change and the majority said they 'cannot accept' that this 'can be achieved by a minister alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.'<sup>28</sup> It is not immediately apparent that this should be contentious, however: while it is true that the Supreme Court said little about this new principle and provided no direct authority for it, its reasoning may simply have been that if the prerogative cannot alter ordinary domestic law, then it follows, *a fortiori*, that it cannot be used to bring about major constitutional legal change.<sup>29</sup>

(f) Both this and the 'source' argument were said by the Supreme Court to be supported by the fact that Parliament had not only made EU law 'a new source' of law in the UK but had given it a unique constitutional status:<sup>30</sup> instead of being displaced by subsequent inconsistent statutes, it instead had the effect of requiring the disapplication of those *future* inconsistent enactments – as demonstrated in *Factortame (no 2)*.<sup>31</sup> This strikingly illustrated the nature and significance of the constitutional change Parliament had brought about through the ECA, adding force to

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<sup>26</sup> Mark Elliott has been heavily critical of both the 'source of law' and 'constitutional change' arguments: see 'The Supreme Court's Judgment in *Miller*: In Search of Constitutional Principle' (*forthcoming* (2017) *CLJ*).

<sup>27</sup> *Miller* at [82].

<sup>28</sup> *Miller*, at [82].

<sup>29</sup> For further analysis of the 'constitutional change' argument see G. Phillipson, 'EU law as an agent of national constitutional change: *Miller v Secretary of State for Exiting the European Union* (2017) *Yearbook of European Law* (*forthcoming*).

<sup>30</sup> *Miller* at [81].

<sup>31</sup> *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 A.C. 603, applying s. 2(4) ECA.

the argument that the Executive could not, by use of the prerogative, change the constitution again by rendering the ECA a dead letter.

## **The Human Rights Act contrasted with the ECA: spelling out domestic law rights?**

When one contrasts the relationship between the ECHR and the Human Rights Act on the one hand and that between EU law and the European Communities Act on the other, some basic and crucial differences become immediately apparent. Perhaps the most fundamental is that, whilst the European Communities Act was *required* in order to allow the UK to join the EU, the same is not true of the Human Rights Act and the ECHR. In other words the ECHR and HRA are not mutually dependent in the way the EU and the ECA are. When the UK joined the then European Community, action on the international plane, via the prerogative, and in domestic law, by Parliament, had to be coordinated, in an intricate sequence. Hence, after the UK had signed the Treaty of Accession on 22 January 1972, the ECA underwent its passage in Parliament, receiving Royal Assent on 17 October 1972. It was thus ready in good time for the moment some ten weeks later when the UK actually joined the then EC, on 1st January 1973 (the date the Treaty of Accession entered into force), ensuring that the UK immediately fulfilled the basic requirement of membership that directly-effective EU law be given full and immediate effect in domestic law. This demonstrates a key point: that the relevant statute, the ECA, *was an essential aspect of the UK becoming a lawful member of the EU*. Without it, the UK would still have become a member, but, since EU law would not have had effect in domestic law, it would have been in immediate and grave breach of the Treaties and a basic precondition of membership.

The contrast with the ECHR-HRA relationship could hardly be starker. No legislative action whatever was required when the UK became a signatory to the ECHR in 1951: the ECHR, unlike EU law, does not require its own incorporation,<sup>32</sup> or ‘direct effect’.<sup>33</sup> Instead, it operates (for the UK at least) in a conventionally dualist way.<sup>34</sup> This was vividly illustrated by the fact that it was not until almost *50 years after* the UK had become a signatory to the ECHR that the Human Rights Act came into force (in 2000), giving domestic effect to the Convention rights. Moreover, the two remain legally independent: the HRA could be repealed tomorrow without causing any immediate problem with the UK’s basic adherence to its international law obligations under the Convention.<sup>35</sup>

Looking at the basic structure of the two Acts, the contrast only appears stronger. The ECA mentions no particular provisions of EU law (save the names of the EU Treaties themselves)<sup>36</sup> and thus specifies no particular EU law content to which the Act gives domestic effect, which instead varies ‘from time to time’.<sup>37</sup> In contrast, the HRA sets out, in Schedule 1, the full text of the rights to which it gives effect – those it defines as ‘the Convention rights’. Section 1(1) states that ‘the Convention rights’ means those set out in specified Articles of the Convention<sup>38</sup> and section 1(3) states that ‘The Articles are set out in Schedule 1.’ Thus, far

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<sup>32</sup> As held in *Silver v U.K.* 5 E.H.R.R. 347 (1983).

<sup>33</sup> Article 1 requires only that Contracting Parties ‘secure’ to all within their jurisdiction the enjoyment of the Convention rights.

<sup>34</sup> Albeit subject to the general principle of statutory interpretation that the UK is assumed not to intend to legislate so as to undermine its obligations in international law (see, e.g. *R (Brind) v Secretary of State for the Home Department* [1991] 1 A.C. 696. See also the judgment of Lord Kerr in *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [235]-[262], which includes dicta to the effect that particular human rights treaties *may* have a form of direct effect in UK law.

<sup>35</sup> Albeit that adverse rulings by the Strasbourg Court against the UK would presumably become more likely, in the absence of a statute specifically designed to protect the rights at the domestic level.

<sup>36</sup> S. 1(1) ECA.

<sup>37</sup> Section 2(1) ECA.

<sup>38</sup> Namely Articles 2 to 12 and 14 of the Convention, (b) Articles 1 to 3 of the First Protocol, and (c) [Article 1 of the Thirteenth Protocol], as read with Articles 16 to 18 of the Convention.

from being a mere 'conduit', which serves to convey unspecified international law content into domestic law, the HRA appears to set out *domestic law rights*, the text of which are thus definitively set out in an Act of Parliament. The strength of this reading is considered further below.

### The contrary, 'dependence' argument: the statutory definition of 'the Convention'

The above would suggest *prima facie* that, were the prerogative to be used to withdraw from the ECHR, the Human Rights Act would remain unaffected and thus no issue of frustration would arise. As noted in the Introduction, however, there is another approach, which we term 'the dependence' reading: one that, if correct, turns the above analysis above on its head and renders 'the Convention rights' given effect in the HRA wholly dependent upon the UK's continued adherence to the ECHR. As Mark Elliott,<sup>39</sup> Alex Peplow<sup>40</sup> and Jack Williams<sup>41</sup> have pointed out, buried away in an obscure provision of the HRA is a definition that could mean withdrawal from the ECHR would result in there being no 'Convention rights' for the purposes of the Human Rights Act. As noted above, section 1(1) defines the Convention rights as being 'the rights and fundamental freedoms set out in Articles 2-12 and 14 of *the Convention*.' How, then, does the Act define 'the Convention'? The answer is found in section 21(1) which provides:

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<sup>39</sup> M. Elliott, 'The Supreme Court's Judgment in Miller: In Search of Constitutional Principle' (*forthcoming 2017 CLJ*). Elliott notes this to be an arguable point rather than considering it in detail.

<sup>40</sup> A. Peplow, 'Withdrawal from the ECHR after Miller – A Matter of Prerogative?', U.K. Const. L. Blog (28th Feb 2017) (available at <https://ukconstitutionallaw.org/>)

<sup>41</sup> 'Miller and the Human Rights Act 1998: can the Government withdraw the UK from the ECHR by the royal prerogative?' available at <http://publicsectorblog.practicallaw.com/miller-and-the-human-rights-act-1998-can-the-government-withdraw-the-uk-from-the-echr-by-the-royal-prerogative/> Williams acknowledges discussions with the authors in arriving at this argument.

“the Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4th November 1950 *as it has effect for the time being in relation to the United Kingdom* (our emphasis).

So, the argument goes, the definition of ‘the Convention rights’ is dependent upon the definition of ‘the Convention’. And ‘the Convention’, as defined in the HRA, means ‘the ECHR as it has effect in relation to the United Kingdom’ at a given point in time. Were the UK to withdraw from the ECHR then it would no longer ‘have effect in relation to the UK.’ There would then be no ‘Convention’ for the purposes of the HRA; and since ‘the Convention rights’ means the rights set out in ‘the Convention’ there would no longer be any such rights given effect by the HRA. The result would be that the HRA would be emptied of ‘Convention rights’: withdrawal would cause a whole set of domestic law rights to simply evaporate. Assuming the above to be correct,<sup>42</sup> withdrawal would plainly amount to the frustration of the HRA and the wholesale loss of the domestic law rights currently enjoyed under it. Applying *Miller*, there is no doubt that this would render use of the prerogative to withdraw from the ECHR unlawful.<sup>43</sup>

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<sup>42</sup> A possible counter-argument is that ‘for the time being’ refers to the time the Human Rights Act was enacted. As such, any extension or reduction in Convention rights since then would require future legislative approval. See T Hickman, *Public Law After the Human Rights Act* (Hart: 2010), 338-339.

<sup>43</sup> There is an alternative reading under which it would be argued that, while withdrawal from the ECHR *would* bring an end to the domestic effect of the rights under the HRA, this was consistent with the intention of the Act and hence would not be unlawful. The argument would be that the rights given effect by the HRA were always intended to be *conditional* upon prerogative action to remain within the ECHR itself (citing the s 21(1) point above). If the rights are conditional on an exercise of prerogative power, then that power can be used to withdraw from the ECHR without unlawfulness, even though the domestic effect of the rights disappears. This would be an adaptation of the argument that was run by the Government in *Miller* in relation to the EU law rights given effect by the European Communities Act 1972. We do not consider it further since it was emphatically rejected by the Supreme Court in *Miller* itself and if applied to the ECHR-HRA seems even less likely to succeed, given the HRA appears to lack the ‘ambulatory’ quality of the ECA.

## The alternative approach: bifurcating ‘the Convention’ and ‘the Convention rights’

However, while the above argument is undoubtedly a cogent one, it is not the only viable interpretation of the Human Rights Act. It is based upon a literal reading of section 21(1). However, we suggest that an alternative reading exists. This reading *bifurcates* the terms ‘Convention’ and ‘Convention rights’, such that the two definitions operate separately as distinct aspects of the basic architecture of the Act. We stress that we do not present this as a ‘broad, purposive’ reading that we prefer to the ‘literal’ dependence reading. Nor need it rest on the adoption of the approach of the majority in *Miller*, which has been criticised for failing to provide a clear account of when a ‘realistic’ or ‘fundamental purpose’ approach to statutory interpretation should be adopted, and what this may mean when applied to legislation.<sup>44</sup> Moreover, adoption of this reading is not dependent upon the classification of the HRA as a ‘constitutional statute’,<sup>45</sup> which should be read in a more purposive or realistic manner; such an approach is not always adopted by the courts.<sup>46</sup> Rather our contention is that this is a viable textual reading of the Act itself.

The hidden weakness in the ‘dependence’ argument is that it assumes that ‘the Convention’ in section 21(1) *must* govern the meaning of ‘the Convention rights’ in section 1 and Schedule 1. There is of course textual support for this reading: after all, section 1 refers to Articles of ‘the Convention’ and the only definition of ‘the Convention’ is in section 21(1). However, the proposition does not *necessarily* follow. We can see why by first considering

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<sup>44</sup> Elliott, note 39 above.

<sup>45</sup> See *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2002] Q.B. 151 and *R (HS2) v Secretary of State for Transport* [2014] UKSC 3, [2014] 1 W.L.R. 324.

<sup>46</sup> See e.g. *Imperial Tobacco Ltd v Lord Advocate (Scotland)* [2012] UKSC 61 esp. at [14]; D Feldman, ‘Statutory Interpretation and Constitutional Legislation’ (2014) L.Q.R. 473, S Dimelow, ‘The interpretation of “constitutional” statutes’ [2013] L.Q.R. 498.

the wording of the two provisions. Section 21 is careful to point out that the definition it provides is of 'the Convention'. And it comes after the separate definition of 'Convention rights', which is found in section 1 of the Act. Section 1 has the heading 'The Convention Rights'; section 1(1) states:

'In this Act "the Convention rights" means the rights and fundamental freedoms set out in (a) Articles 2 to 12 and 14 of the Convention, (b) Articles 1 to 3 of the First Protocol, and (c) Article 1 of the Thirteenth Protocol, as read with Articles 16 to 18 of the Convention'.

To this, section 1(3) adds that, 'The Articles are set out in Schedule 1'. Schedule 1 thus provides the text of the Articles of the ECHR referred to in section 1 – the Articles that contain 'the Convention rights' defined in that section.

Support for this reading lies in the recognition that, if one takes the dependence, rather than the bifurcation approach, then Schedule 1 is reduced to mere surplage. If the definition of 'the Convention rights' is dependent upon the definition of 'the Convention', then there is no need for Schedule 1 – it is rendered otiose. Instead of Schedule 1 doing what it does on its face – setting out the Articles in which the relevant Convention rights are found – it becomes mere convenience: at most perhaps a way of stopping a reader of the HRA from having to look up the relevant ECHR rights, providing clarity but having no further legal effect. The dependence argument thus entails assuming that Parliament had put an entire Schedule into an Act of Parliament to no legal effect - merely spelling out what already follows from the list of Convention rights provided in section 1. A reading of the Act that does not assume Parliament to have done so is surely preferable.

The bifurcation reading in contrast explains why both definitions are required – because they perform different functions, while Schedule 1 has a distinct purpose: placing

the text of the rights in an Act of Parliament in order to render their status as domestic law rights beyond doubt. 'The Convention' functions in the HRA to refer to the international treaty. Thus it is notable, for example, that section 10(1)(b) refers to 'the Convention' *not* 'the Convention rights'. That makes sense, because this provision is there to allow use of the section 10 'fast-track procedure' to amend incompatible legislation in response to an adverse ruling from Strasbourg. Thus this provision is concerned with the Convention as a treaty, and Strasbourg rulings against the UK under it. The bifurcation reading is further reinforced by the fact that the list of rights found in the HRA and those that currently bind the UK are different. The most notable difference is Article 13 ECHR, the right to 'an effective remedy before a national authority' for violation of one of the substantive Convention rights. Whilst the UK can be held to account by Strasbourg for failing to provide for an adequate remedy, this is not a Convention right an individual can rely upon before the UK Courts under the HRA.<sup>47</sup>

### **Bifurcation or Dependence?**

Thus both the dependence reading and the bifurcation approach can be supported by the wording of section 1, section 21 and Schedule 1 of the Human Rights Act. Is there a reason to argue that one is a better reading than the other? This question prompts deeper reflection on the purpose of the Human Rights Act. Is it intended simply to provide UK citizens with the same protection of rights in domestic law that they would have achieved if they had gone to Strasbourg; or was the purpose of the Act to provide for a domestic protection of human rights based on the Convention rights, but with their interpretation determined by UK courts, including the possibility of providing a stronger protection of rights? The former would

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<sup>47</sup> Article 15 ECHR is also not incorporated, although the UK courts have used Article 15 when considering derogations from the Convention. See T. Hickman, *Public Law After the Human Rights Act* (Hart: 2010), 338-339.



support a dependence argument, whilst the latter is more in line with the bifurcation argument. Hickman suggests that different provisions of the Act encapsulate *both* purposes, such that there is ‘a tension at the very heart of the Act between the creation of new domestic rights and the provision of a remedy in domestic law for rights that exist on the international plane’.<sup>48</sup>

For example, section 2(1) HRA states that the UK courts ‘must take into account’ rulings of the Strasbourg Court. Had the HRA followed the model of the ECA and made the rulings of the Strasbourg Court definitive and binding on UK courts as section 3(1) ECA makes the rulings of the CJEU,<sup>49</sup> that would have established that the rights were ‘owned’ by the international court, which alone could rule on their proper meaning.<sup>50</sup> However, this wording is not used, suggesting that, whilst the definition of Convention rights is *guided* by the Strasbourg Court, it is possible for domestic rights to diverge from Convention rights.<sup>51</sup> This would suggest that ‘the Convention’ in section 21(1) means, as it says, the international treaty as it has effect in relation to the UK, while ‘the Convention rights’ in section 1(3) means the domestic rights created by the HRA. Similar arguments can be made as regards key sections of the Act which go above and beyond what would be required of the UK to ensure it maintained its domestic obligations under the ECHR – e.g. sections 3, 4 and 19, or the

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<sup>48</sup> Hickman, *ibid* at 27; and see generally his discussion of this tension at 26-30.

<sup>49</sup> ‘...any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court’: European Communities Act 1972, s. 3(1).

<sup>50</sup> *R (Chester) v Secretary of State for Justice* [2013] UKSC 63, [2014] A.C. 271, [120]. We consider the arguments around s 2(1) further below.

<sup>51</sup> Hickman puts the matter more strongly, arguing that ‘Section 2..indicates that that the Act was intended to create domestic rights and that domestic courts should develop a domestic constitutional rights jurisprudence’: note 47 above, at 27.

definition of 'public authorities' as including private individuals performing public functions in section 6 of the Act.<sup>52</sup>

These arguments do not, however, provide conclusive support for the bifurcation argument. Other provisions of the Act appear to suggest that the purpose of the Act was merely to ensure that the UK adhered to its international law obligations, such that rights can be protected without going to Strasbourg. For example, section 7 provides standing to a 'victim' of a breach of Convention rights, rather than the broader 'sufficient interest' test for judicial review.

This tension between the HRA as creator of domestic rights and the Act as mere provision of domestic remedy for international law rights is, as Hickman has observed, 'carried through into the case law' on the Act.<sup>53</sup> On the one hand there are strong judicial statements expressing a clear distinction between the Convention as *international instrument* on the one hand and the *domestic* rights created by and scheduled to the Act on the other.<sup>54</sup> In *McKerr*,<sup>55</sup> Lord Nicholls specifically denied that *the ECHR rights* had been 'incorporated' into UK law. Instead, he said explicitly that courts must understand the distinction between the ECHR rights and 'rights *created by the 1998 Act* by reference to the Convention' (our emphasis). The rights under the ECHR 'now exist side by side' with the rights created by the Act.<sup>56</sup> He went on:

The former existed before the enactment of the 1998 Act and they continue to exist [but] are not as such part of this country's law]... The latter came into existence for the first time on 2 October 2000 [as]...part of this country's law.'

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<sup>52</sup> See section 6(3)(b).

<sup>53</sup> Hickman, note 47 above, at 30.

<sup>54</sup> For a discussion of this case law, see Hickman, note 47 above, at 30-46.

<sup>55</sup> [2004] 1 W.L.R. 807.

<sup>56</sup> [2004] 1 W.L.R. 807 at [25].

Lord Hoffmann spelt this out even more clearly:

Although people sometimes speak of the Convention having been ‘incorporated’ into domestic law, that is a misleading metaphor. What the Act has done is to create *domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention....*<sup>57</sup>.

Lord Bingham quoted and expressly endorsed this analysis in *Al Skeini*.<sup>58</sup> Similarly, in *Re P*, Lord Mance said the HRA ‘creates as part of this country's law *rights in the same terms as the Convention rights*’, referring to these as ‘*new domestic rights*’.<sup>59</sup> Lord Hoffmann agreed, affirming that ‘“Convention rights” within the meaning of the 1998 Act are domestic and not international rights’. The rights are ‘set out in the Schedule to the Act...reproducing the *language* of the international Convention.’<sup>60</sup> Thus the rights given effect by the HRA are rights ‘in a domestic statute’, ‘even if its provisions are in the same language as the international instrument’.<sup>61</sup> Such statements evidently provide strong support for the bifurcation reading.

However, case law can also be cited which relies on the view that the purpose of the Human Rights Act is to incorporate the UK’s international obligations under the Convention into domestic law. Clear statements to this effect have been made by senior judges advocating the so-called ‘mirror principle’ approach to section 2(1) HRA. As its name suggests, under this approach UK courts should ensure that their decisions ‘mirror’ those of the

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<sup>57</sup> [2004] 1 W.L.R. 807, at [63] (our emphasis).

<sup>58</sup> *Al-Skeini v Secretary of State for Defence* [2008] 1 A.C. 153, at [10].

<sup>59</sup> *Re P* [2008] UKHL 38; 1 A.C. 173, at [128] (our emphasis).

<sup>60</sup> [2008] UKHL 38; 1 A.C. 173, at [33] (our emphasis).

<sup>61</sup> [2008] UKHL 38; 1 A.C. 173, at [34].

Strasbourg Court, providing neither a lower nor a higher protection of rights.<sup>62</sup> In *Ambrose v Harris*, Lord Hope, giving the leading judgment, said:

‘Parliament never intended to give the courts of this country the power to give a more generous scope to those rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the treaty obligation, into free-standing rights of the court’s own creation.’<sup>63</sup>

To like effect is Lord Bingham’s well-known statement in *Ullah* that ‘... the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded *only* by the Strasbourg court’.<sup>64</sup> The fact that his Lordship applied this observation to the approach the courts should follow when applying the Convention rights *domestically* makes plain his view that courts should mirror in domestic law the ‘authoritative’ interpretations of Strasbourg. As we will see below, however, recent caselaw has seen a substantial retreat from this approach (below at 000-000).

The discussion thus far suggests that both the dependence and the bifurcation argument can be supported both by the text of the HRA and by judicial pronouncements on its purpose. It is next necessary to consider the interpretation of section 21 itself. This provides strong evidence in favour of the dependence argument. Courts have interpreted section 21 to refer to the Convention rights in force at the time the action complained of took place. Hence courts have held that, since there is no provision extending Article 1 of the First Protocol to certain British Overseas Territories it cannot be a ‘Convention right’ for the

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<sup>62</sup> See *R (Alconbury Development Ltd) v Secretary of State for the Environment, Transport and Regions* [2001] UKHL 23, [2003] 2 A.C. 295.

<sup>63</sup> [2011] UKSC 43; [2011] 1 WLR 2435, [19].

<sup>64</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 A.C. 323, at [20].

purposes of the application of the Human Rights Act to persons living in those territories.<sup>65</sup> It has further been held that, where international law obligations deriving from the UN Charter would override a Convention right at the international level, then the Human Rights Act does not give domestic effect to that particular Convention right.<sup>66</sup> This suggests that the definition of the 'Convention rights' in section 1 and Schedule 1 is dependent upon the definition of the 'Convention' found in section 21. These cases also include clear dicta supporting this reading. In *Quark Fishing*, Lord Bingham said bluntly that: 'A party unable to mount a successful claim in Strasbourg can never mount a successful claim under... the [HRA]', while Lord Nicholls agreed that 'the obligations of public authorities under [the HRA] mirror in domestic law the treaty obligations of the United Kingdom in respect of corresponding articles of the Convention...'.<sup>67</sup> In *Al Jedda*, Lord Justice Brooke, giving the unanimous judgment of the Court of Appeal, said:

'although those Articles of the ECHR are set out in Schedule 1 to the Act... if for any reason one or more of them do not have effect for the time being in relation to the United Kingdom, then to that extent they do not create a Convention right that can be relied on through the machinery of the 1998 Act.'

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<sup>65</sup> *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, HL(E) (in relation to South Georgia and South Sandwich Islands); *R (Barclay) v Secretary of State for Justice* [2009] UKSC 9, [2010] 1 AC 464 and *R (Barclay) v Lord Chancellor and Secretary of State for Justice (2)* [2014] UKSC 54, [2015] AC 276 (concerning Jersey). We are grateful to Tom Hickman for drawing our attention to the significance of these cases and his analysis of them (note 47 above at 31-40).

<sup>66</sup> *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26, [2008] 1 AC 153, *R (Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, [2008] 1 AC 332 and *Ahmed v Her Majesty's Treasury* [2010] UKSC 5, [2010] 2 AC 534.

<sup>67</sup> *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, HL(E) at [25] and [34] respectively.

And the Court expressly stated that the definition of the Convention ‘needs to be read into s 1(1) in order to bring home its effect’.<sup>68</sup>

This may appear to deliver the killer blow to the bifurcation argument. However, it is important to recognise the specific nature of this case law. First, it concerns issues of territorial application and the scope of the Convention more generally as opposed to the content of a particular Convention right. There are strong arguments for adhering to an interpretation of the Act which focuses on the Act as providing a national remedy for breaches of the Convention in circumstances that concern the scope of the UK’s international law obligations. Second, to have interpreted section 21 differently in the territorial scope case law could have had further constitutional repercussions, particularly as concerns the UK’s relationship with its overseas territories. Third, the case law on extra-territoriality and the potential clashes with UN security resolutions arose in very sensitive areas concerning the activities of the UK’s armed forces overseas. Given this context it is perhaps not surprising that the courts interpreted the HRA in a deferential manner that avoided the UK Government being placed under contradictory obligations deriving from the UN and from the ECHR.<sup>69</sup> In short, these contextually-specific arguments may not apply more broadly; indeed, given that the approach taken in these cases appears flatly inconsistent with dicta from other cases examined above to the effect that the HRA creates ‘new, domestic law rights’, there is reason not to treat them as applying generally. Finally, the approach taken in these cases, especially in *Al Jedda*, has been subject to serious criticism. Tom Hickman notes that

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<sup>68</sup> *R (Al-Jedda) v Secretary of State for Defence* [2007] QB 621, [93] & [94].

<sup>69</sup> And in other cases, deferred to Strasbourg’s view on the interrelationship of Convention obligations with UNSCR obligations: *Ahmed v Her Majesty’s Treasury* [2010] UKSC 5, [2010] 2 AC 534 at [93].

‘the implication of the argument accepted by the Divisional Court and the Court of Appeal is that the rights protected by the HRA can be altered, limited and even repealed by the Government agreeing to inconsistent international obligations which have priority in international law over Article 5 [ECHR]’.<sup>70</sup>

It may even be doubted whether this finding is consistent with *Miller* itself:<sup>71</sup> there is certainly a strong argument that such cases should be confined to the peculiar circumstances arising from the UK’s (perceived) obligations under a UN Security Council Resolution. This is particularly so given that, as Hickman points out,<sup>72</sup> the basic proposition that any alteration in the Convention as it applies to the UK in international law are *automatically reflected* in domestic law would render sections 14 and 15 of the Act redundant. These provisions, as discussed below (at 000-000), require derogations and reservations to the Convention at the international law level to be ‘designated’ by an Order in Council in order to take effect in domestic law. They would not be needed if the ‘automatic reflection’ approach advocated in *Al Jedda* were right.

Thus as we have seen, both the dependence and the bifurcation argument can be supported by an analysis of wording of some provisions of the Human Rights Act and by reliance on competing statements in the case law regarding the basic purpose of the Act. Given that the issue is thus unresolved, context may play a large role in dictating which argument the court will adopt in any given situation – a point we return to below. What does remain clear, however, is that some provisions of the Human Rights Act refer to ‘Convention

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<sup>70</sup> Hickman, note 47 above, at 32-36.

<sup>71</sup> It can probably be squared with *Miller* by noting that in one case the UK Government was *required* by a UNSCR to override a Convention right (albeit that it agreed to that UNSCR) whereas *Miller* was concerned with a *unilateral decision* of the UK Government to withdraw from the EU and this article with such a decision in relation to the ECHR.

<sup>72</sup> Hickman, note 47 above, at 33.

rights’ and some to ‘the Convention’. As discussed further below, all the main sections governing the way in which the HRA protects human rights in the UK – including the key sections 2, 3, 4, 6, 7, 10(1)(a), 12, 13 and 19 - refer *not* to ‘the Convention’, but to ‘Convention rights’, as defined in section 1 and Schedule 1. Hence if we *do* use the bifurcation approach, withdrawal from the Convention would not affect ‘the Convention rights’ (as distinct from ‘the Convention’); rather, as domestic rights, they would continue to be given effect by the HRA in domestic law even following withdrawal. We have thus shown that the argument made to date contending that withdrawal from the ECHR would render the HRA a dead letter has a possible response. However, our analysis below also shows that the bifurcation argument cannot save all of the provisions of the Act – sections 10(1)(b) and section 18 would still appear to be partially frustrated and sections 14, 16 and 17 fully so.

This renders the situation rather more complex and nuanced than hitherto appreciated. For, as we argue below, the significance of this narrower finding on frustration of the HRA may depend on how we read *Miller*. If we read *Miller* as meaning that *any* arguable frustration of *any* statutory provision is sufficient to prevent use of the prerogative, then it would seem clear that the prerogative cannot lawfully be used to withdraw from the ECHR. However, other readings of the majority judgment in *Miller* may push towards the opposite conclusion, particularly given the focus of the judgment on the loss of EU law rights and the prevarication as to whether the removal of the third category of rights at play - those rights which could not be replicated in domestic law<sup>73</sup> – would be enough to render unlawful use of the prerogative to trigger Article 50. We explore these possible readings further below, once we have considered the effect of withdrawal on the remaining provisions of the HRA.

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<sup>73</sup> See *Miller*, at [69]-[73] for the distinction between different categories of rights that would be potentially removed were the UK to withdraw from the EU.



## Frustration, Modification and Bifurcation

### *Provisions that remain effective under bifurcation.*

Sections 3, 4, 5, 6, 7, 8, 9, 10(1)(a), 19, 20 and Schedules 1 and 2 of the HRA would not be modified or frustrated by withdrawal from the ECHR if we accept the bifurcation argument. This is because all of these provisions refer to ‘Convention rights’, which would continue to be those set out in Schedule 1. Under section 3 courts would continue to interpret legislation in a manner compatible with ‘Convention rights’ so far as it is possible to do so. Section 4 would continue to empower courts to issue a declaration of incompatibility when satisfied that a legislative provision is incompatible with a ‘Convention right’. Section 5 would still regulate procedural issues that arise when a court is contemplating issuing a declaration of incompatibility. Under section 6, public authorities, including courts<sup>74</sup> would continue to be bound to act compatibly with the same Schedule 1 ‘Convention rights’, unless incompatible primary legislation mandated or plainly permitted incompatible action<sup>75</sup> and under section 7, proceedings could continue to be brought for breach of such rights. That section, together with section 8, would continue to set out the relevant domestic standing requirements, remedies, and procedures.<sup>76</sup>

Section 10(1)(a) empowers Ministers of the Crown to take remedial action to ensure the compatibility of legislation with Convention rights. Section 10 includes a Henry VIII clause in subsection 3, empowering a Minister to use delegated legislation to make necessary amendments to primary legislation, where there are ‘compelling reasons’ for modifying

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<sup>74</sup> S. 6(3) Human Rights Act 1998.

<sup>75</sup> S. 6(2) Human Rights Act 1998.

<sup>76</sup> S. 9 serves only to qualify the actions that may be brought under s. 7(1)(a) in respect of judicial acts and so is not considered further here.

primary legislation in this manner. Sections 20 and Schedule 2 set out the procedure to be used when enacting such remedial orders: that they are to be made by statutory instrument (section 20) and subject to the affirmative resolution procedure detailed in Schedule 2.<sup>77</sup> Section 10(1)(a) would not be modified or frustrated by the use of the prerogative to withdraw from the ECHR, because it empowers the government to use the ‘fast-track’ procedure in response to legislation declared incompatible with a ‘Convention right’. Domestic courts could still make declarations of incompatibility and, therefore, there could still be instances where there were compelling reasons for responding to such declarations by using delegated as opposed to primary legislation.<sup>78</sup>

Section 19 requires that, before the second reading of a Bill, the Minister in charge of that Bill ‘must...make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention rights’ or ‘make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill.’ Since this provision also depends upon assessing legislation against ‘the Convention rights’, it would not be frustrated by withdrawal under the bifurcation reading.

Sections 2 and 15 of the Act may also be neither modified nor frustrated by the use of the prerogative to withdraw from the ECHR. As noted above, section 2 requires that courts ‘take into account’ the decisions of the European Court of Human Rights. Potential difficulties

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<sup>77</sup> The order must be approved by both Houses within a period of 60 days. There is special provision for urgent cases. In addition, the order must explain the reasons for making a remedial order as opposed to modifying legislation.

<sup>78</sup> We consider s. 10(1)(b) below. We do not consider in detail s. 11 (safeguarding other domestic rights), s. 12 (dealing entirely with domestic claims brought under Article 10 especially the granting of interim injunctions) or s. 13, which requires courts to have particular regard to the importance of the right to religious freedom, but has not had any significant application. None appear to raise issues of frustration.

may appear to arise due to the way in which the courts have *interpreted* section 2, in particular as regards the so-called ‘mirror principle’ (that UK courts should ensure that their domestic interpretation of the rights ‘mirror’ those of the Strasbourg Court).<sup>79</sup> If one were to regard section 2 as a clear textual articulation of the mirror principle, justified by the UK’s membership of the ECHR and its entailing relationship with Strasbourg, then it might appear that it would effectively be changed by the use of the prerogative. However, it is readily apparent that section 2 does not itself require that the UK courts should follow the Strasbourg case law in the manner required by the mirror principle.

Section 2(1) merely requires courts to ‘take account’ of the Strasbourg case law. The mirror principle is a *judicial* creation, arising from judicial interpretation of this section. It would be open for the courts to interpret section 2(1) differently after an exercise of a prerogative power to withdraw from the Convention. The Supreme Court is not bound by its own previous decisions,<sup>80</sup> and withdrawing from the ECHR would provide a good reason for reconsidering ‘the mirror principle’, particularly given that it was established while the UK is a member of the ECHR. But in any event, recent case law has since mounted what Lord Wilson in a recent decision of the Supreme Court described as a substantial ‘retreat’ from the ‘mirror’ principle.<sup>81</sup> Indeed, a recent, major article on section 2 argues that the courts’ approach to it has in the last 10 years ‘steadily been modified in order to more readily reflect [the] discretion

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<sup>79</sup> See *R (Alconbury Development Ltd) v Secretary of State for the Environment, Transport and Regions* [2001] UKHL 23, [2003] 2 A.C. 295 and *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 A.C. 323.

<sup>80</sup> Practice Statement (Judicial Precedent) House of Lords, 26 July 1966, [1966] 1 W.L.R. 1234.

<sup>81</sup> *Moohan v Lord Advocate* [2014] UKSC 67, [2015] A.C. 901, [104]–[105]; in that passage, headed ‘Retreat from the Ullah Principle’, Lord Wilson summarises developments showing that ‘protracted consideration has led this court substantially to modify’ that principle.

apparent in the wording of section 2(1)' itself.<sup>82</sup> Withdrawal would likely only accelerate this trend towards greater independence from the Strasbourg case-law.

A clear example of how section 2 may apply post withdrawal can be found in current case law, where UK courts are faced with unclear or inconsistent case law from the Strasbourg court. For example, the recent Supreme Court decision of *R (Hicks) v Metropolitan Police Commissioner* concerned the compatibility with Article 5 ECHR of the use of arrest powers to prevent breaches of the peace.<sup>83</sup> The court found that, despite a lack of a clear and consistent line of decisions from Strasbourg, there were nevertheless fundamental principles underpinning Article 5, which required courts to ensure that individuals were protected from arbitrary detention and had timely access to judicial oversight of their arrest. These requirements have to be balanced against the need to ensure that the police are able to effectively perform their duty to keep the peace and to protect the rights and freedoms of others.<sup>84</sup> Strasbourg had recently examined a similar situation to that which arose in *Hicks* in *Ostendorf*, in which it concluded that Article 5 had been breached.<sup>85</sup> However, the Supreme Court declined to apply *Ostendorf*, instead following the reasoning of the dissenting *minority* in that judgment, regarding it as more in line with the underlining principles of Article 5 and earlier Strasbourg case law.<sup>86</sup> The Supreme Court recognised that, 'whilst this court must take into account the Strasbourg case law, in the final analysis it has a judicial choice to make', given the competing and complementary principles underpinning Article 5 and the lack of a clear line of case law.<sup>87</sup>

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<sup>82</sup> H. Fenwick and R. Masterman, 'The Conservative Project to 'Break the Link between British Courts and Strasbourg': Rhetoric or Reality?' (forthcoming) (2017) M.L.R.

<sup>83</sup> [2017] UKSC 9, [2017] AC 256.

<sup>84</sup> *R (Hicks) v Metropolitan Police Commissioner* [2017] UKSC 9, [2017] A.C. 256, [29].

<sup>85</sup> *Ostendorf v Germany* (2013) 34 BHRC 738.

<sup>86</sup> *R (Hicks) v Metropolitan Police Commissioner* [2017] UKSC 9, [2017] A.C. 256, [32]-[38].

<sup>87</sup> *R (Hicks) v Metropolitan Police Commissioner* [2017] UKSC 9, [2017] A.C. 256, [32].

Following withdrawal from the ECHR, there would no longer be any need to treat decisions of the Strasbourg court as authoritative. Nevertheless, the UK courts could still perfectly sensibly ‘take account’ of that case law, looking to the principles underlying decisions of the Strasbourg court and choosing to adhere to those that best reflected those principles. Not only would this mean that section 2 could continue to operate, and so would not be frustrated, but this would arguably bring its interpretation closer to its literal meaning. And while there would likely be a subtle modification of domestic law, it would not be brought about *automatically* by use of the prerogative to withdraw; rather it would come about through the *courts* changing their interpretative approach *following* such withdrawal. Withdrawal would provide the *reason* for the change but would not itself bring it about.

Section 15, perhaps surprisingly, is also a provision that would not be frustrated by withdrawal. Its purpose is purely historical: where the UK has entered a reservation to the ‘Convention’, the domestic effect of the relevant Convention right is made permanently subject to the reservation (unless the UK withdraws it). It is important to note that reservations can be made *only* at the time of acceding to the ECHR itself or to one of its Protocols. The UK has only one reservation from the ECHR, regarding the scope of Article 2 of the First Protocol right to education. That specific reservation is defined in section 15 as a ‘designated reservation’; its text is set out in Schedule 3 and, by virtue of section 1(2), that Article has domestic effect subject to it.<sup>88</sup> Following withdrawal, these provisions would continue to have full effect. Were a domestic claim to be made under the HRA concerning Article 2 of the First Protocol, the courts would use the above provisions to ensure that the

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<sup>88</sup> The remainder of s 15 deals with the withdrawal of a designated reservation ss (3), the making of a fresh designation order ss (4) and a power to make amendments to the HRA by order to reflect designation orders or withdrawals of reservations (ss (5)).

reservation in Schedule 3 was given effect in domestic law. Section 15 would thus continue to serve the same purpose in domestic law as it does now and hence would not be frustrated.

### *Provisions substantially or wholly frustrated even under bifurcation*

In this section, we consider section 10(1)(b), section 18, and sections 14, 16, and 17 of the Act. Our analysis shows that these provisions would be either modified or frustrated by withdrawal, even under the bifurcation interpretation; however it also shows that some of these provisions would retain some effect, while those that appear to be rendered otiose may be regarded as somewhat peripheral.

Section 10(1)(b) is the second trigger for the use of the so-called ‘fast-track’ procedure. It applies when, as a result of a ruling of the Strasbourg Court against the UK, it appears that a legislative provision breaches the UK’s obligations under ‘the Convention.’ Its effect is thus dependent on the meaning of ‘the Convention’, as opposed to ‘the Convention rights’. At first sight it appears that it would be rendered wholly otiose even under the bifurcation argument. Following withdrawal from the ECHR, there would be no further Strasbourg decisions addressed to the UK; hence this trigger for the fast-track power would become a dead letter. Prerogative action would have removed the whole basis for the provision – the UK’s adherence to the jurisdiction of the Strasbourg court.

However, there are two possible applications of section 10(1)(b) that would remain, even following withdrawal from the ECHR. Hence its *applicability* would be very substantially reduced, but it would not be completely emptied of purpose or content. The first application relates to the terms of Article 58 ECHR, which governs withdrawal from the ECHR. Article 58(2) makes clear that the UK would continue to have obligations under the Convention in relation to acts done before withdrawal became effective. Thus judgments of the Strasbourg

Court in relation to acts done in the interim between notification of withdrawal and withdrawal becoming effective could still be made against the UK post-withdrawal – which, given the long delays before the Strasbourg court, could be for a substantial period of time.<sup>89</sup> Such judgments would still trigger section 10(1)(b), giving it its first continuing purpose.

Second, it is vital to note that the section 10(1)(b) trigger is not pulled by *a ruling* of the Strasbourg Court as such. Rather it is activated, ‘when it appears to a Minister...*having regard to* a finding of the European Court of Human Rights’ against the UK that ‘a provision of legislation is incompatible with’ the UK’s obligations under the Convention (our emphasis). Consequently, this provision would have a second application, in that a Minister could, at any time following withdrawal, come to the view that a legislative provision was incompatible with a decision of the Strasbourg Court against the UK, given at *any time* previously, that remained unimplemented.<sup>90</sup> Consider, for example, the election, some time after withdrawal from the ECHR, of a liberal-minded Government, seeking closer ties with Europe, which decides that the UK should finally comply with the *Hirst* prisoner voting judgment and its sequels.<sup>91</sup> A Minister in such a Government could then find that, ‘having regard’ to these Strasbourg judgments, the relevant provisions in UK legislation forbidding prisoners to vote were incompatible with the Convention. Moreover, given the existence of a series of UK

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<sup>89</sup> We are grateful to Roger Masterman for this point re the effect of the time-lag at Strasbourg.

<sup>90</sup> It could only bite on obligations in respect of *unimplemented* judgments; while a government Minister could in theory decide that new legislation was incompatible with *any* previous decision of the Strasbourg court against the UK, the provision is only activated where the Minister believes the legislation to be incompatible with the UK’s ‘obligations’ under ‘the Convention’ – and the UK would have no further obligations under the Convention, save in respect of the two situations outlined in the text.

<sup>91</sup> *Hirst v UK (no 2)* [2005] ECHR 681; *Firth v UK*, no 44784/09 (14 August, 2014); *McHugh v UK*, no 51987/08, 10 February 2015.

judgments that had also reached this conclusion<sup>92</sup> and the existence of a Draft Bill,<sup>93</sup> circumstances could arise in which the Minister might reasonably conclude that there were compelling reasons for using the fast-track procedure. Section 10(1)(b) would thus still have a possible application.

The above analysis demonstrates that the application of section 10(1)(b) would be severely limited but not wholly eliminated: it would still have effect but only in two extremely narrow and finite sets of circumstances. As such, it could be said to be substantially, but not wholly, frustrated - a point whose significance we return to below.

Much the same may be said about section 18, which regulates the appointment of UK judges to the Strasbourg Court. The basic purpose of section 18 would appear to be frustrated. The judges of the Court consist of representatives from the High Contracting Parties – the signatory States of the ECHR.<sup>94</sup> As the UK would no longer be a Party, there would no longer be the possibility of the UK nominating a judge to the ECHR. However, again, we need to examine the wording of section 18 more precisely. Section 18(2) states that '[t]he holder of a judicial office may become a judge of the European Court of Human Rights without being required to relinquish his office', with the rest of the section providing for those who return to judicial office following completion of their service as a judge of the court. This section merely provides a *power* for a member of the UK judiciary to become a judge of the Strasbourg Court. Although unlikely, this may still be possible: for example, another High Contracting Party could include a member of the UK judiciary on its list of three candidates, and the UK judge could then be elected by the Parliamentary Assembly.<sup>95</sup> This would not

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<sup>92</sup> *Smith v Scott*, 2007 SC 345; *R (on the application of Chester v Secretary of State for Justice* [2014] UKSC 35; [2014] A.C. 271.

<sup>93</sup> Voting Eligibility (Prisoners) Draft Bill 2012 Cm 8499.

<sup>94</sup> Article 22, ECHR.

<sup>95</sup> European Convention on Human Rights, Article 22.



breach the ECHR. There is nothing in Article 21 stating that Contracting Parties may *only* nominate individuals who are nationals of, or judges in, that state.<sup>96</sup> Moreover, Article 21(2) also states that judges 'shall sit on the Court in their individual capacity'.

Section 18, therefore, could still have a function - but one that would appear highly unlikely to materialise in practice. Further, this application would modify one of the purposes of the HRA. Section 18 would no longer provide a means of providing for the UK to fulfil its international law obligations under the ECHR; rather it would regulate the odd set of circumstances that would arise should a current member of the UK judiciary be appointed to the Strasbourg Court to represent a different Signatory State. Therefore, whilst it is possible to argue that section 18 would not be wholly frustrated, this argument is not a strong one: this provision could be said to be frustrated in its entirety, being made at the least devoid of its original purpose.

Sections 14, 16 and 17 provide the clearest examples of provisions of the Act that would appear to be frustrated by withdrawal from the ECHR, even under the bifurcation reading. These sections cater for the situation in which the UK enters a derogation from the Convention – a temporary suspension of adherence to one or more of the Convention rights, in response to a war or other public emergency, as defined by Article 15 ECHR.<sup>97</sup> Section 14 has the same basic purpose in relation to derogations as section 15 performs for reservations - to translate the effect they have on the UK's obligations under the Convention into domestic law, thus ensuring that any changes to the meaning of 'the Convention' at the international

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<sup>96</sup> Article 21(1) ECHR requires only that 'judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence'. A small, UK-friendly state like Malta might conceivably nominate a UK judge. At present for example the biographical information for the San Marino judge Kristina Pardalos states that she was born and educated in the US.

<sup>97</sup> Article 15 specifies the test for a lawful derogation and specifies the rights from which no derogation can be made in any circumstances.

law level are *mirrored* in the domestic definition of ‘the Convention rights’. This is made clear by section 1(2) HRA, which states that the Articles set out in section 1(1) ‘are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).’ At present there are no derogations,<sup>98</sup> so none are specified in section 14 and Schedule 3 has no text on derogations. Hence neither section 14, nor section 16 (dealing with the period for which designated derogations have effect) nor section 17, (providing for periodic review of such derogations) has any current application. One might therefore argue that, since these sections have no current application - and could go without application for decades, should the UK continue to adhere to the ECHR and enter no derogations to it - it matters little if their application in future was rendered impossible.

This argument, however, seems unconvincing. The purpose of these sections is to provide in domestic law for something that could *never* happen following withdrawal. This demonstrates that they have a *purpose* – to cater domestically for the eventuality of derogation from the ECHR – that only makes sense in light of continuing UK adherence to the ECHR. Hence it seems that their basic purpose *would* be frustrated should the UK cease to be a signatory to it. Moreover, they could not even be put to a new purpose – allowing for purely domestic suspension of the Convention rights: section 14(1) defines a ‘derogated designation’ as ‘any derogation made by the United Kingdom from an Article of the Convention’ – and such a definition would no longer make sense were the UK to no longer be a party to the Convention.

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<sup>98</sup> The UK’s previous derogation from Art 5(3) in respect of *Murray v UK* (1996) 22 EHRR 29 was withdrawn in 2001; its derogation from Article 5(1) to allow for the detention of foreign terrorism suspects under the ACTSA 2001 was withdrawn following the decision of the House of Lords in *A v Secretary of State for the Home Department* [2005] 2 A.C. 68.

## Miller to the rescue?

Our initial assessment of the *Miller* judgment above provided a bare outline of the arguments used, and the conclusion reached by the majority in the Supreme Court. At this stage, we need to provide a more detailed account of the range of justifications for the conclusion in *Miller*, in order to consider how these different justifications might affect the arguments made above around the frustration or otherwise of different provisions of the HRA. First, it could be argued that *Miller* rules out use of the prerogative whenever this would lead to the modification of any provision of domestic law, unless primary legislation permits this modification.<sup>99</sup> Alternatively, *Miller* could be said to prevent the use of a prerogative when it would *frustrate* legislation, by emptying the legislation or a statutory provision of its content, or preventing the ‘effectual operation’ of a statutory provision.<sup>100</sup> When determining whether the effectual operation of legislation has been prevented, the court may also be influenced by the fact that the statute in question is of ‘constitutional’ status, particularly in the case of legislation that has such anything like the constitutional importance of the European Communities Act 1972. The conclusion in favour of the claimants in *Miller* itself was *also* arguably influenced by the fact that the use of the prerogative to trigger Article 50 would have led to the wholesale loss of EU law *rights* enjoyed in domestic law. Finally, the justification for the outcome in *Miller* is influenced by what Mark Elliott refers to as the ‘constitutional scale’ argument – that, as the Supreme Court held, significant changes to the constitution must be made via legislation and not the executive using the prerogative.<sup>101</sup> In what follows

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<sup>99</sup> *Miller*, at [50].

<sup>100</sup> *Miller*, at [51].

<sup>101</sup> M Elliott, ‘The Supreme Court’s Judgment in *Miller*: In Search of Constitutional Principle’ (forthcoming CLJ).

we consider the significance of each of these various aspects of *Miller* for the issues canvassed above.

### *Readings of the frustration principle*

If we adopt the first interpretation of *Miller*, then, regardless of whether we adopt the dependence or the bifurcation argument, there are provisions of the HRA whose operation would be modified. Consequently, the Government would not be able to use the prerogative to withdraw from the ECHR. However, it is important to recognise that the principle that the prerogative ‘does not enable ministers to change statute law or common law’<sup>102</sup> is subject to two caveats - instances where an exercise of prerogative power can have *permitted* domestic legal consequences. Of these only the second is relevant here:<sup>103</sup> those instances ‘where the effect of an exercise of prerogative powers is to change the facts to which the law applies’.<sup>104</sup>

We argued above that sections 18 and 10(1)(b) would be partially frustrated or modified by the use of the prerogative to withdraw from the ECHR. However, we could also interpret the impact of ECHR withdrawal on these sections as a use of prerogative powers to modify the facts to which the law applies. Section 18 would no longer apply to situations in which a UK judge becomes the judge of the Strasbourg Court representing the UK, as a signatory State. Instead, the provision would apply to the, admittedly rare, set of circumstances in which a UK judge was appointed a judge of the Strasbourg Court on behalf of another signatory State. Section 10(1)(b) would no longer apply to *all future* decisions of the Strasbourg Court that UK legislation contravenes Convention rights. It would instead *only*

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<sup>102</sup> *Miller*, at [50].

<sup>103</sup> The first is where the very nature of the prerogative contains an ability to alter domestic law (said in *Miller* at [52] to apply to the use of the prerogative to alter the conditions of service of Crown servants in *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374)).

<sup>104</sup> *Miller*, at [53].

apply to such decisions that occurred during the 6 months withdrawal period, or prior to withdrawal. Are these circumstances sufficiently similar to the examples cited in *Miller* - the use of the prerogative to declare war, making previous lawful actions treasonable, or the use of the prerogative to extend territorial waters, thus criminalising broadcasts that would previously have been lawful?<sup>105</sup> Or can we distinguish these examples from the situation which would arise were the prerogative to be used to revoke the UK's membership of the ECHR, given that this would not just change the factual matrix to which sections 10(1)(b) and 18 applied, but would also alter their purpose? The latter argument appears the stronger.

Further complexities arise from the fact that the frustration principle can apply both narrowly – that is, when a statutory provision is frustrated, or its effectual operation prevented - or more broadly: when Parliament's *overall intention* is frustrated. We argue above that the effect of the bifurcation reading is to preserve the effective operation of what one might term the 'core' rights-protecting provisions of the HRA. This supports the argument that the Act *as a whole* would not be frustrated by withdrawal since it would still fulfil what is arguably its core purpose – providing domestic protection of 'Convention rights' as defined by the Act. However, it would no longer serve what is perhaps its ancillary purpose: making domestic provision for aspects of the UK's membership of the ECHR, such as the appointment of judges and the making of derogations.

This creates some doubt as to whether *Miller* would apply to the use of the prerogative to withdraw from the ECHR. The majority decision of the Supreme Court referred to *Laker Airways*<sup>106</sup> and *Fire Brigades Union*<sup>107</sup> as examples of where the exercise of a

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<sup>105</sup> *Miller*, at [53].

<sup>106</sup> *Laker Airways v Department of Trade* [1977] Q.B. 643.

<sup>107</sup> *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 A.C. 513.

prerogative had frustrated a statutory provision. In *Laker Airways* the Civil Aviation Act 1971, which regulated the process for applying for a licence as a designated carrier, was used to grant a licence for Laker Airways to operate transatlantic flights. Following a change of government and therefore of policy, the foreign affairs prerogative was used to, in effect, revoke the designation of the airline's landing rights in the US, thus rendering the licence issued under the legislation useless. The prerogative was thus used to negate a specific decision taken under legislation. The legislative provisions were thus essentially *by-passed*, rather than being generally modified or rendered devoid of purpose. However the Court of Appeal found that the action taken had frustrated the general intention of Parliament, precisely *because* the protection the legislation provided had been bypassed. Thus the case is not closely analogous to the situation we are considering. On the one hand, use of the prerogative in our case would have much greater general significance – and one can point to specific provisions in the relevant legislation – the HRA – that *would* be frustrated. But on the other, whereas Laker's business was ruined at a stroke, and he was deprived, the court found, of the statutory protection Parliament had intended him to have, in our case no individual could point to either loss of rights or even damage to their interests through use of the prerogative. It would be a case of, as it were, 'abstract' frustration of certain, rather peripheral statutory provisions.

In *Fire Brigades Union*, the prerogative was used to introduce a less generous scheme for criminal injuries compensation from that set out in as yet unimplemented provisions of legislation; the in-force commencement clause in the legislation required the Minister to consider when to bring the substantive provisions into force by Order. The use of the prerogative to bring in a different scheme was found to have specifically frustrated the commencement clause: the introduction of a radically different compensation scheme under

the prerogative rendered the implementation of the statutory scheme practically impossible. Hence the Minister was found to be in breach of his statutory duty to keep under consideration when to introduce the statutory scheme (a finding made easier by a Government statement in a White Paper that the statutory scheme would not be brought in and would be repealed).<sup>108</sup> As Lord Browne Wilkinson observed, the proposed use of the prerogative would 'frustrate the will of Parliament expressed in a statute and...pre-empt the decision of Parliament whether or not to continue with the statutory scheme'.<sup>109</sup> As such, the commencement clause was frustrated in the sense that the Minister had acted directly contrary to the legal duty it was found to lay on him – to keep under consideration when to introduce the statutory scheme. Moreover, criminal injuries compensation is an important benefit to individuals, such that the proposed action under the prerogative would directly harm individuals' interests – which is of course why the Fire Brigades Union, representing a group of workers particularly likely to be injured through criminal activity, brought the case in the first place.

If we apply *FBU* to our scenario, there are two concrete differences. First, use of the prerogative to withdraw from the ECHR would not directly *contradict* any statutory duty laid by the HRA on government; rather, by changing the international legal situation, it would remove or dramatically reduce the possibility of a contingency catered for by statutory provisions from coming about in the future. That is a considerably more indirect form of frustration than seen in *FBU* and possibly one that courts would conclude did not fall within the frustration doctrine. Moreover, the rendering inert of sections 14, 16 and 17 would not

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<sup>108</sup> 'Compensating Victims of Violent Crime: Changes to the Criminal Injuries Compensation Scheme', Cm. 2434 at [38].

<sup>109</sup> *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 A.C. 513, 552.

adversely affect either the rights or interests of any individual. Again therefore *FBU* is, at least in principle, distinguishable from our scenario.

### *Removal of domestic law rights or interests*

In *Miller* the majority in the Supreme Court supported their conclusion that prerogative powers could not be used because withdrawal from the EU would remove domestic law rights.<sup>110</sup> Indeed, out of all the frustration cases, *Miller* was by far the most dramatic in terms of its impact on rights. Whereas *Laker Airways* was concerned with the damage to a single airline business, and *FBU* with a reduction in the quantum of *ex gratia* payments, the triggering of Article 50 would, *Miller* found, result in the wholesale loss of the entire corpus of EU law rights enjoyed in domestic law by virtue of the European Communities Act.<sup>111</sup> But the key point is that in *all* these ‘frustration’ cases, the courts could be seen as acting at least in part to protect the rights or interests of individuals from government interference – and in *Miller* this function was of particular importance.

In our case, if we accept the bifurcation argument, the main provisions of the HRA would still be able to protect domestically interpreted ‘Convention rights’. The sections that would be modified or frustrated provide procedural mechanisms; they do not either create or protect rights. Moreover, the rights that would be lost or reduced – e.g. the right to apply to be a judge at the Court – are similar to the third category of rights examined in *Miller*.<sup>112</sup> These are the rights that cannot be replicated in UK law, because they are exclusively ‘club

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<sup>110</sup> *Miller*, at [73].

<sup>111</sup> It was noted that, while it would be possible for Parliament to preserve certain rights through translating them into purely domestic law (so called ‘category 1 rights’) the court had to assess the situation as it was now: *Miller* at [70].

<sup>112</sup> *Miller*, at [69] and [72].



membership' rights.<sup>113</sup> The Supreme Court did not reach a definitive conclusion as to whether loss of these rights would suffice to prevent the use of the prerogative.<sup>114</sup> The Divisional Court did and thought this alone would have sufficed:<sup>115</sup> but it was considering the loss of individual rights core to a democracy – the right to stand and vote in elections to the European Parliament. So even if *Miller can* be read as finding loss of these rights sufficient, there are no comparable rights at stake in our case. Thus the 'loss of rights' argument has no clear application to our scenario.

### *Arguments from 'Constitutional Scale'*

Finally we may consider the possible relevance of arguments drawn in *Miller* from the European Communities Act 1972's status as a key constitutional statute and the consequent 'constitutional scale' argument. In *Miller*, the Act's constitutional importance led to its interpretation in a more 'fundamental' or 'realistic' manner<sup>116</sup> and to the conclusion that its frustration would amount to a major constitutional change, which could not be brought about by the executive acting alone. However, to apply this interpretation to our scenario may lead to the opposite conclusion to that reached in *Miller*. Arguably it is more 'realistic' to adopt the bifurcation argument, with its conclusion that the main purpose of the HRA would not be frustrated, since its main rights-protective provisions would continue unaffected even without the UK's membership of the ECHR. The bifurcation argument would also preserve the Act's constitutional status, allowing it to continue to operate to protect rights in the absence

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<sup>113</sup> The most important of these considered in *Miller* was the right to stand and vote in elections for the EU Parliament under the European Parliamentary Elections Act 2002.

<sup>114</sup> *Miller*, at [72]-[73].

<sup>115</sup> *R (Miller) v Secretary of State for Exiting the European Union* [[2016] EWHC 2768 (Admin), [2017] 1 All E.R. 158, [61] to [63].

<sup>116</sup> *Miller* at [61].

of ECHR membership. Moreover, under the bifurcation reading of the HRA, the executive would not be making a sweeping constitutional change without legislative authority; it would at most be modifying minor elements concerning the mirroring of the UK's international obligations in domestic law, but leaving the constitutional protection of domestic rights in the UK intact.

However it is also arguable that the HRA is designed to provide a stronger domestic protection of human rights *against the backdrop of our membership of the ECHR*. This is why sections 14 to 18 and Schedule 3 effectively mirror the UK's international law obligations. Unlike the situation with European Union law and the European Communities Act 1972, the HRA was not *required* to fulfil an international law obligation, like ensuring the primacy of directly effective EU law in domestic law. Rather, it the HRA was designed to provide a better means of protecting these rights in the context of the UK's membership of the ECHR.

## Conclusion

The discussion above has shown that assessing the effect of withdrawal from the ECHR on the Human Rights Act is a considerably more complex and subtle enterprise than hitherto realised. This is in part because the different justifications provided by the majority in *Miller* may cut both ways. Whilst we could read the use of the prerogative to withdraw from the ECHR as prevented because section 14 HRA would be modified, or frustrated, is this conclusion definite? Unlike in *Laker* or *Fire Brigades Union* this would not have a consequence of harming individual rights or interests. In fact, since section 14 is designed to allow for a reduction in rights protection, its becoming a dead letter would, if anything, achieve the opposite effect. The HRA's constitutional importance may mean it is interpreted in a manner

that preserves rights, such that the use of the prerogative would be found not to frustrate its purpose. However, its importance could equally be argued to support the conclusion that *any* arguable frustration of its provisions was of particularly serious concern, reinforcing the certainty of the conclusion that the prerogative could not be used.

Our conclusion is therefore that the application of the *Miller* frustration principle on its own does not yield a clear and unambiguous result. We therefore make the tentative suggestion that the result a court reached might well depend on the constitutional context in play. If faced with a *Miller*-like legal challenge to the proposed use of the prerogative to withdraw from the ECHR, a court would be likely to adopt an interpretation that regarded *any* potential modification of the Act, partial frustration of any of its provisions,<sup>117</sup> or removal of the legal circumstance that would trigger its application<sup>118</sup> as prohibiting use of the prerogative. Thus, putting the matter at its lowest, we can conclude that any government would incur significant legal hazard if it sought to use the prerogative to denounce the Convention.

This is particularly so, given that withdrawal would also result in other changes of constitutional significance *not* considered by this article, namely the loss of the right of individuals to petition the Strasbourg Court and the ending of the UK's current Article 46 obligation to comply with adverse judgments of that Court.<sup>119</sup> The UK government would doubtless argue that both individual petition and the Article 46 obligation were created purely by prerogative action on the international plane and so can be removed by it. However a claimant could counter with the 'new' principle introduced by *Miller*, requiring a court to

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<sup>117</sup> As in ss 10(1)(b) or 18.

<sup>118</sup> As in ss 14, 16 and 17.

<sup>119</sup> Substantive analysis of the significance of these crucially important changes lies outside the scope of this Article, since they are not created or regulated by the HRA. But we very much hope to see academic attention paid to them in future.

consider whether these two changes were of sufficient constitutional significance as to require explicit authorisation by Parliament. Given the uncertain scope of this principle,<sup>120</sup> its possible application here only cautions further against such use of the prerogative.

However, this article has also demonstrated that, were withdrawal to be specifically authorised by a short Act of Parliament, as after *Miller*, there is an interpretation of the HRA – the bifurcation reading - that would allow its continued application to protect Convention rights in domestic law even after withdrawal. As we noted in the Introduction, a court would be forced to choose between this reading and its rival ‘dependence’ interpretation in the event that a claimant brought a case under the HRA after withdrawal, only to be faced by a public authority advancing the dependence argument in order to show that its section 6 obligations to respect Convention rights had disappeared with withdrawal. In such a situation, it might well be the fact that the bifurcation reading would allow for continuing robust statutory protection of rights, while the dependence approach rendered the Act’s protection for Convention rights nugatory that ultimately lead a court to choose the former over the latter. In the end therefore the question of whether the HRA becomes a dead letter or morphs into a free-standing Bill of Rights may become a matter of judicial construction driven by the constitutional context.

It is common for academic articles to present themselves merely as a call for ‘further research’ or as only ‘starting a debate’. In this case that really is our aim. This is the first article to have considered this complex issue in depth and in analysing the many provisions of the HRA it has covered a great deal of ground rather quickly; for example one could probably write a whole article on the possible impact of withdrawal on the courts’ approach to section

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<sup>120</sup> For detailed consideration of whether the ‘constitutional change’ argument could ever function in a free-standing way, see Phillipson, note 29 above.

2 HRA.<sup>121</sup> It is certain that there are further arguments to be made, counter-arguments we have not considered, and complexities and subtleties that we have missed.<sup>122</sup> We very much hope that the analysis we have presented will spark further academic engagement with this issue – engagement that will deepen understanding both of the subtle relationship between the HRA and the ECHR and of the crucially important constitutional principles addressed in *Miller*.

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<sup>121</sup> For an article that addresses this point in more detail see note 82 above.

<sup>122</sup> For example, we have deliberately confined ourselves to analysing the provisions of the Act and judicial interpretation of them, rather than looking also to the White Paper that preceded the HRA and any *Pepper v Hart* statements about its purpose made during its passage through Parliament.